

**FEDERAL ELECTION COMMISSION**  
999 E Street, N.W.  
Washington, D.C. 20463

SEP 21 1997  
FEDERAL ELECTION COMMISSION

SEP 16 4 15 PM '97

**FIRST GENERAL COUNSEL'S REPORT**

**SENSITIVE**

MUR 4546  
Date Complaint filed: October 29, 1996  
Date Activated: March 6, 1997  
Staff Member: Tara D. Meeker

COMPLAINANT: Paul Berendt, Chair, Washington State Democrats

RESPONDENTS: Friends for Jack Metcalf Committee and Frank M. McCord, as treasurer<sup>1</sup>

RELEVANT STATUTES AND REGULATIONS: 2 U.S.C. § 432(i)  
2 U.S.C. § 434(b)(3)(A)  
11 C.F.R. § 104.7  
11 C.F.R. § 104.3

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

**I. GENERATION OF MATTER**

MUR 4546 arose from a complaint received by the Federal Election Commission on October 29, 1996. Paul Berendt ("Complainant") alleged that Friends for Jack Metcalf and Frank M. McCord, as treasurer, violated provisions of the Federal Election Campaign Act of 1971, as amended, ("Act" or "FECA"). Respondents were notified of

<sup>1</sup> Jack Metcalf, running as the incumbent, won the 1996 house race for the second district of Washington State.

the complaint on November 2, 1996. Friends for Jack Metcalf and Frank M. McCord, as treasurer, did not respond to the complaint.

## II. FACTUAL AND LEGAL ANALYSIS

### A. Law

The Act requires that the treasurer of a political committee file periodic reports of receipts and disbursements. 2 U.S.C. § 434(a)(1). Under 2 U.S.C. § 434(b)(3)(A), each report must disclose the identification of each person making aggregate contributions to the reporting committee in excess of \$200 in the calendar year. The term "person" includes individuals. 2 U.S.C. § 431(11). In the case of an individual, identification is defined as the name, mailing address, and the occupation of such individual, as well as the name of his or her employer. 2 U.S.C. § 431(13)(A) and 11 C.F.R. § 100.12. The Supreme Court upheld this reporting requirement, first enacted in 1971, against a first amendment challenge in Buckley v. Valeo, 424 U.S. 1, 61-84 (1976).

The Act provides a "safe harbor" for political committees based on their efforts at compliance with the reporting regulations. When the treasurer of a political committee shows that "best efforts" have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any records of such committee shall be considered in compliance with the Act. 2 U.S.C. § 432(i). The treasurer and the committee will only be deemed to have exercised best efforts if all written solicitations for contributions include a clear request for the contributor's full name, mailing address, occupation and name of employer. 11 C.F.R. § 104.7(b)(1). The request and statement shall appear in a clear and conspicuous manner on any response

material included in the solicitation. *Id.* The request and statement are not clear and conspicuous if they are in small type of comparison to the solicitation, or if the printing is difficult to read or if the placement is easily overlooked. *Id.* For each contribution received in excess of \$200 per year which lacks required contribution information, a committee demonstrates "best efforts" by: (1) making at least one follow-up, stand-alone request for missing information; (2) within thirty days of receipt of a contribution with incomplete contributor identification; (3) without also soliciting a contribution<sup>2</sup>; and (4) reporting previously missing information in amendments to the reports.<sup>3</sup> 11 C.F.R. § 104.7(b)(2). In Republican National Committee, et al. v. FEC, Civil Action No. 94-5248 (D.C. Cir. 1996), the United States Court of Appeals for the District of Columbia Circuit upheld the requirement for a stand-alone, follow-up request to obtain missing contributor information, although vacating the requirement for the mandatory language specified in 11 C.F.R. § 104.7(b)(1). However, the language requirement is not an issue in this MUR at this time.<sup>4</sup>

<sup>2</sup> If the request is written, it shall be accompanied by a pre-addressed return post card or envelope for the response material. The written or oral request shall not include any material on any other subject or additional solicitation, except that it may include language solely thanking the contributor for the contribution.

<sup>3</sup> 11 C.F.R. § 104.7(b)(4) requires that amendments be submitted either with: (1) the committee's next regularly scheduled report as an amended memo Schedule A; OR (2) as an amendment to the report originally disclosing the contribution, on or before its next regularly scheduled reporting date.

<sup>4</sup> As of July 2, 1997, the Commission announces new "best efforts" final rules which change the mandatory statement previously required in 11 C.F.R. § 104.7(b)(1). The new regulation contains suggestions of statements for political committees to use, while allowing flexibility in wording. Both of these statements contain the words "best efforts" and continue to ask specifically for name, mailing address, occupation, and name of employer.

The "best efforts" regulation provides an affirmative defense to the lack of compliance with the Act's disclosure requirements; it does not mandate any action by political committees and there is no penalty for violating it. Only committees that fail to comply with the reporting requirements would have occasion to invoke the "best efforts" standard. For such committees, the Commission's "best efforts" regulations specify the minimum a committee must do to show that it has used its best efforts to obtain and disclose the name, address, occupation, and employer of each of its donors who contributed more than \$200 annually.

Congress has long recognized that disclosure of contributor occupation and employer information is an integral part of the reporting requirement. The "best efforts" regulation has its origins in a statutory amendment to the Act after Buckley, which added the following sentence to the end of 2 U.S.C. § 434(b),

When committee treasurers and candidates show that best efforts have been used to obtain and submit the information required by this subsection, they shall be deemed to be in compliance with this subsection.

FECA Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 480 (1976 Leg. Hist. at 1132) (emphasis added). Three years later, the "best efforts" statutory provision was recodified to its current form with only minor changes in the original language:

When the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any records of such committee shall be considered in compliance with this Act or chapter 95 or chapter 96 of title 26.

2 U.S.C. § 432(i) (emphasis added).<sup>5</sup>

**B. Complaint**

Complainant states that Friends for Jack Metcalf and Frank M. McCord, as treasurer, violated the FECA by failing to disclose the employer name or occupation as required by law for over seventy percent of the contributors on the July 1996 Second Quarterly Report and the October 15, 1996 Third Quarterly Report.<sup>6</sup> Attachments 1 and 2. Complainant maintains that the Metcalf committee failed to amend these two reports to add missing employer/occupation information in the months following their filing, and to this date has still not disclosed the required information. According to complainant, "FEC rules are in place to prevent such flagrant and disturbing attempts to hide sources of contributions from voters." Complaint at 2.

The complaint also details a Metcalf fund-raiser with Speaker of the House Newt Gingrich on May 24, 1996, where over \$60,000 was raised for the Metcalf campaign. Complainant asserts that the Metcalf committee made no disclosure of the employer name or occupation for \$19,870 received within two days of the fund-raiser from 54 individual contributors. Of these 54 individuals, the employer name or occupation was furnished for only 14 of them, or 26 percent. "It then had almost two full months after Newt Gingrich's visit to track down the employer name or occupation for that huge influx of cash." Complaint at 1.

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<sup>5</sup> The only actual substantive change in the provision was the deletion of "candidates" as persons to whom the "best efforts" standard is directly applicable; the standard itself was untouched.

<sup>6</sup> After researching internal disclosure reports, the actual percentage of contributors for which this information was missing was found to be 74 percent in the July Report and sixty-nine in the October Report.

Friends for Jack Metcalf and Frank M. McCord, as treasurer, did not respond to the complaint.

### III. ANALYSIS

There are 115 individual contributions totaling \$47,398, on the Metcalf committee's July 1996 Second Quarterly Report.<sup>7</sup> Of these 115 listings, 85 of them, contributions totaling \$31,373, list the contributor's employer and occupation as unknown; resulting in a non-compliance rate of 74 percent. Attachment 4.

The Metcalf committee's Third Quarterly Report also showed a high non-compliance rate. For the period ending September 30, 1996, "occupation unknown" was listed for 29 of the 42 individual contributors, resulting in a non-compliance rate of 69 percent. Attachment 11.

Although not stated in the complaint, further research by this Office revealed that the same situation had occurred on the Metcalf committee's First Quarterly Report, dated April 15, 1996. There was a non-compliance rate of 63 percent. Attachment 3. In that report, the Metcalf committee reported receiving an additional \$10,750 from eighteen out of thirty individuals without the disclosure of employer or occupation information required by the FECA. This information was again listed as unknown.

Adding the amounts together from all three 1996 Quarterly Reports, entries reflecting at least \$46,898 in contributions were in violation of the FECA reporting requirements. With consistent failure to disclose rates between 63 and 74 percent, it

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<sup>7</sup> Of the 117 contributions, the Schedule A includes two entries which appear to be PACs rather than individuals: the Transportation Political Education League and Friends of John Boehner.

appears that the Metcalf committee, despite several notifications from RAD, failed to take seriously this aspect of the reporting requirement. There was not even an employer name or occupation listed for the committee's own treasurer.<sup>8</sup>

With respect to the three reports at issue, the Metcalf committee did not respond to RAD's inquiries until five months after receiving its first RFAI from RAD on this issue and less than a month before the election. At that time, the committee provided RAD with a letter it claims to have sent to contributors with missing information. However, since this letter is dated October 16, 1996, and since the Metcalf committee still has not amended any of its 1996 Quarterly Reports to include any newly received employer and occupation information, it raises a question whether the committee even sent the letter. Attachments 5 and 6. In addition, RAD indicated that the office had concluded that the letter did not appear to satisfy the best efforts regulation. This Office has also reviewed the October letter and generally agrees with RAD's conclusion because, for most of the contributors in question, the mailing of the October letter was not sent within thirty days of the receipt of a contribution as required by 11 C.F.R. § 104.7(b)(2). See Attachment 7.<sup>10</sup>

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<sup>8</sup> Indeed, the facts in this matter raise questions as to whether the failure to adequately disclose this information rises to the level of being knowing and willful.

<sup>10</sup> RAD's conclusion at that time may also have been based in part on the language of the letter. Since that time, however, the portion of the regulation requiring specific language in such letters was invalidated. See fn. 4 and accompanying text.

The Metcalf committee has made another submission to RAD, which was received on July 2, 1997. That letter was dated June 30, 1997, and described the process the Metcalf Committee had developed to meet the disclosure requirements. Included in that package was another copy of the October 16, 1996 letter. See Attachment 12. The implication of this submission to RAD appears to be at a minimum that no such process existed before October 16, 1996. The committee also recently amended its 1996 30 Day Post General and Year End Reports with respect to additional contributor information.

Based on the foregoing, this Office recommends that the Commission find reason to believe that Friends for Jack Metcalf and Frank M. McCord, as treasurer, violated 2 U.S.C. § 434(b)(3)(A) by failing to provide complete contributor information on either its April, July, or October 1996 Quarterly Reports.

#### IV. DISCOVERY

Further investigation is necessary to explore the attempts to obtain the required contributor information. The investigation will inquire into the mailing of any letters seeking missing employer/occupation information with respect to 1996 contributions. To expedite the investigation, this Office recommends that the Commission approve the attached Interrogatories and Request For Production of Documents.

#### V. RECOMMENDATIONS

1. Find reason to believe that Friends for Jack Metcalf and Frank M. McCord, as treasurer, violated 2 U.S.C. § 434(b)(3)(A).
2. Approve the attached Factual and Legal Analysis.
3. Approve the appropriate letters.



4. Approve the attached Interrogatories and Request For Production of Documents to Friends for Jack Metcalf and Frank M. McCord, as treasurer.

05-04-2014 14:44:00

Lawrence M. Noble  
General Counsel

9/18/97  
Date

BY: Lois G. Lerner by AAS  
Lois G. Lerner  
Associate General Counsel

Attachments:

1. Schedule A from the Metcalf committee's July 15, 1996 Quarterly Report.
2. Schedule A from the Metcalf committee's October 15, 1996 Quarterly Report.
3. Schedule A from the Metcalf committee's April 15, 1996 Quarterly Report.
4. Summarized Table of Unknown Contributors for the July 1996 Quarterly Report.
5. Five Requests for Additional Information from RAD.
6. Responses from the Metcalf committee to RFAs.
7. "Best Efforts" Letter from the Metcalf committee.
8. Second "Best Efforts" Letter from the Metcalf committee.
9. Factual and Legal Analysis for Friends for Jack Metcalf and Frank M. McCord, as treasurer.
10. Subpoena For Interrogatories and Production of Documents to Friends for Jack Metcalf and Frank M. McCord, as treasurer.
11. Summarized Table of Unknown Contributors for the October 1996 Quarterly Report.


11-11-97 10:30 AM



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE  
GENERAL COUNSEL

FROM: MARJORIE W. EMMONS/LISA DAVIS   
COMMISSION SECRETARY

DATE: SEPTEMBER 24, 1997

SUBJECT: MUR 4546 - General Counsel's Report

The above-captioned document was circulated to the Commission  
on Friday, September 19, 1997.

Objection(s) have been received from the Commissioner(s) as  
indicated by the name(s) checked below:

Commissioner Aikens	<u>XXX</u>
Commissioner Elliott	<u>XXX</u>
Commissioner McDonald	—
Commissioner McGarry	—
Commissioner Thomas	—

This matter will be placed on the meeting agenda for  
Tuesday, September 30, 1997.

Please notify us who will represent your Division before the Commission on this  
matter.